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IN THE

OFFICE OF THE

Supreme Court of the United States

COLLEEN P. KRAMER,

Petitioner,

v.

BANC OF AMERICA SECURITIES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff claiming retaliation against an employer under the Americans with Disabilities Act, 42 U.S.C. § 12203, can recover compensatory and punitive damages and, therefore, has a right to a trial by jury.

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Petitioner, Colleen P. Kramer, respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit dated January 20, 2004.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were issued on January 20, 2004. The court of appeals affirmed the decision of the United States District Court for the Northern District of Illinois which denied Petitioner a trial by jury under the Americans with Disabilities Act. The Seventh Circuit's opinion (App. 1a-16a) is reported at 355 F.3d 961 (7th Cir. 2004). The district court's Findings of Fact and Conclusions of Law, entered after trial without a jury, is not reported but is reproduced in Appendix B, pages 17a-37a. Petitioner's jury demand was stricken by the district court on May 10, 2002. (App. 39a.)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Petitioner seeks review was entered on January 20, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. §§ 12112, 12117, 12203, 2000e-5 and 1981a are lengthy and, therefore, are set out in Appendix D, pages 40a-48a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. *The Complaint*

Petitioner Colleen P. Kramer filed her Complaint and jury demand against her former employer, Banc of America Securities, LLC ("BOA"), in the United States District Court for the Northern District of Illinois under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (the "ADA"). The basis for federal jurisdiction in the district court was pursuant to 28 U.S.C. §§ 1331 and 1343(a). A victim of multiple sclerosis, Petitioner alleged that BOA had intentionally discriminated against her in her employment because of her disease. She also alleged that she was fired from her job in retaliation for asserting her rights under the ADA, including the filing of a charge of disability discrimination with the EEOC. She requested relief in the form of back pay, front pay, compensatory damages, punitive damages, loss of benefits and attorneys' fees.

B. *The Statutory Framework of the ADA*

The Americans with Disabilities Act of 1990 prohibits employers from discriminating against employees because of a disability. (42 U.S.C. § 12112(a).) This includes the prohibition of an employer's retaliatory actions against employees who make a charge of discrimination in any proceeding. (42 U.S.C. § 12203(a).) The remedies available for aggrieved employees claiming retaliation under 42 U.S.C. § 12203 are those remedies available under 42 U.S.C. § 12117. In turn, 42 U.S.C. § 12117 refers to the "powers, remedies and procedures" in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, which are available to "any person alleging discrimination on the basis of disability."

Under 42 U.S.C. § 2000e-5(g), then, an ADA plaintiff's remedy for intentional discrimination was injunctive relief including job reinstatement, back pay or "any other equitable relief."

Against the statutory backdrop described above, the Civil Rights Act of 1991 amended and expanded the remedies available to a "complaining party" claiming intentional discrimination in employment. Under 42 U.S.C. § 1981a(a)(1), an employee bringing an action under 42 U.S.C. § 2000e-5, as cross-referenced by the retaliation and remedy provisions of the ADA, 42 U.S.C. §§ 12117 and 12203, also may "recover compensatory and punitive damages." Although 42 U.S.C. § 1981a(a)(2) also refers to the availability of compensatory and punitive damages in an action brought under the ADA for an employer's violation of 42 U.S.C. § 12112, the retaliation provision (42 U.S.C. § 12203) is not mentioned.

Petitioner contends that she was entitled to compensatory and punitive damages under the ADA pursuant to the remedies available under the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5, as amended by the 1991 Civil Rights Act, 42 U.S.C. §§ 1981a(a)(1) and (a)(2). Therefore, Petitioner should have been entitled to a trial by jury under 42 U.S.C § 1981a(c).

C. *The Proceedings Below*

The District Court —

BOA moved for summary judgment of dismissal on Petitioner's ADA claims. The district court granted summary judgment on her claim of disability but denied summary judgment on the claim of retaliation. BOA then moved to strike Petitioner's jury demand on the claimed ground that the ADA did not permit the recovery of compensatory and punitive

damages for a retaliation claim. Over Petitioner's objection, the district court ruled that she was not entitled to recover compensatory or punitive damages and granted BOA's motion to strike her jury demand. (App. 4a, 15a, 24a n.1, 38a.)

Shortly after Petitioner's jury demand was stricken, the case proceeded to trial before the district court on Petitioner's retaliatory discharge claim. The district court entered Findings of Fact and Conclusions of Law in favor of BOA and entered judgment accordingly. (App. 17a-37a.) The underlying facts are also described in the court of appeals' Opinion at pages 2a-3a of the Appendix. Petitioner appealed the district court's ruling on the unavailability of compensatory and punitive damages under the ADA and the lower court's striking of her jury demand, but the court of appeals affirmed the rulings below. (App. 15a.)

The Court of Appeals —

On appeal, Petitioner argued that she was entitled to seek compensatory and punitive damages under the ADA for a retaliatory discharge and that she was therefore entitled to a trial by jury. (App. 1a.) The court of appeals affirmed "the district court's decision to deny consideration of compensatory and punitive damages, and its decision to conduct the trial in this case without a jury." (App. 1a-2a.)

The Seventh Circuit correctly stated that remedies for a party making a retaliation claim against an employer under the ADA "are first determined by reference to 42 U.S.C. § 12117." (App. 6a.) That section, in turn, provides that the "available remedies" are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-4 through e-9. *Id.* The 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g)(1), however, did

not provide for compensatory or punitive damages before the 1991 amendments. (App. 6a.) However, as the court of appeals also correctly stated, the 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), "expands the remedies available" under the 1964 Act, Section 2000e-5(g)(1), "in certain circumstances, *to provide for compensatory and punitive damages*." *Id.* (Emphasis added.) The Seventh Circuit agreed that, had Petitioner been entitled to recover compensatory and punitive damages, she would have been entitled to "a jury trial as a matter of right" under 42 U.S.C. § 1981a(c)(1). (App. 12a.) Nevertheless, the Court held that Section 1981a(a)(2) of the 1991 Civil Rights Act as applied to the ADA, although it expanded the available remedies, does not permit a plaintiff making a claim of retaliation to recover compensatory or punitive damages. Therefore, the Court ruled, Petitioner has "no statutory or constitutional right to a jury trial." (App. 10a.)

In reaching its conclusion, the court of appeals relied upon the analysis contained in *Brown v. City of Lee's Summit, Mo.*, 1999 WL 827768, *2-*4 (W.D. Mo. 1999). (App. 7a.) Thus the Seventh Circuit agreed with the holding in *Brown* that "'a meticulous tracing of the language of this *tangle of interrelated statutes* reveals no basis for plaintiff's claim of compensatory and punitive damages in her ADA retaliation claim.'" *Id.* (Emphasis added.) Therefore, the court of appeals concluded, because "claims of retaliation under the ADA ([42 U.S.C.] § 12203) are not listed [under 42 U.S.C. § 1981a(a)(2)], compensatory and punitive damages are not available for such claims." *Id.* at 8a. As a result, the Court stated, Petitioner's remedies were limited to those equitable remedies against an employer such as back pay, front pay, job reinstatement and injunctive relief as set forth in 42 U.S.C. § 2000e-5(g)(1). *Id.*

REASONS FOR GRANTING THE PETITION

This case presents this Court with a valuable opportunity to resolve a question under federal employment law which the Seventh Circuit stated "appears to be one of first impression for federal circuit courts," a question that is critical to thousands of aggrieved employees. Namely, that question — on which there now is considerable inconsistent circuit court and district court authority — is whether ADA plaintiffs are entitled to compensatory and punitive damages as well as trial by jury for intentional retaliation claims. The question is recurring throughout the federal courts.

The Seventh Circuit and at least three other circuits are now divided, not only about approvals of ADA retaliation jury trials, but also about the rationale. District courts in circuits that have not yet decided the issue are also coming to different conclusions. Much of the conflict is over the interpretation of the damage remedies available to ADA plaintiffs under 42 U.S.C. § 2000-5, as amended and expanded by 42 U.S.C. § 1981a. The Court should seize this opportunity to resolve the disagreement among the circuits, correct the serious error made by the Seventh Circuit in this case and clarify an issue facing the district courts which can critically deprive victimized employees of their Seventh Amendment right to a trial by jury.

Although other circuit courts of appeals have not yet specifically analyzed the "tangle of interrelated statutes" as the Seventh Circuit did by reference to the *Brown* decision, this Court should not wait for further decisions on the question presented because the law in the circuit and district courts is now in conflict and can only become more sharply divided over time. The Equal Employment Opportunity

Commission also has taken a position contrary to the Seventh Circuit in its Compliance Manual, Section 8 ("Retaliation"), where it states that "[c]ompensatory and punitive damages . . . are available for retaliation claims brought under . . . the ADA." (May 20, 1998.) The time is ripe for the Court to set the record straight. In the alternative, Petitioner respectfully suggests that the Court consider inviting the Solicitor General to file a brief expressing the views of the EEOC.

I. THE DECISION BELOW CONFLICTS WITH THE SETTLED LEGAL UNDERSTANDINGS OF OTHER CIRCUIT COURTS OF APPEALS

An employee's fundamental right to a trial by jury under the ADA is at stake. This Court's decision in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65, 110 S. Ct. 1339, 1344-45 (1990), held that an employee seeking back pay for a union's alleged breach of its duty of fair representation had a right to a jury trial under the Seventh Amendment. Regarding the Seventh Amendment and the importance of the jury system, this Court stated:

> Since the merger of the systems of law and equity, see Fed.Rule Civ.Proc. 2, this Court has carefully preserved the right to trial by jury where legal rights are at stake. As the Court noted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988 (1959), "Maintenance of the jury as a *fact-finding body is of such importance* and occupies so firm a place in our history and jurisprudence that any seeming *curtailment of the right to a jury trial should be scrutinized with the utmost care*."

> (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935)). (Emphasis added.)

Because Petitioner is seeking and should be entitled to recover compensatory and punitive damages, which are legal in nature, the Seventh Amendment should entitle her to a jury trial for her claim of retaliation under the ADA.

In the opinion below, the Seventh Circuit acknowledged that the Second, Eighth and Tenth Circuit Courts of Appeals "have affirmed jury verdicts where compensatory damages had been awarded on ADA retaliation claims." (App. 6a-7a.) See *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-45 (10th Cir. 1999). Accord, *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001). Although the court below stated that none of these circuit decisions "examined the legal question of whether [compensatory and punitive] damages [under 42 U.S.C. § 1981a(a)(2)] were authorized for an ADA retaliation claim", the three circuits nonetheless permitted juries to decide compensatory and punitive damages in ADA retaliation cases. (See App. 7a.) The Seventh Circuit also noted that the six district courts which "have addressed the question are split." *Id.*

1. ***The Eighth Circuit —***

Although the Seventh Circuit expressly adopted the Missouri district court's analysis in the 1999 *Brown v. City of Lee's Summit* decision, a subsequent and more recent opinion by the Eighth Circuit in *Salitros v. Chrysler Corp.*,

306 F.3d 562 (8th Cir. 2002), affirmed a jury's verdict of $100,000 in punitive damages and $445,516 in front pay on plaintiff's claim that Chrysler retaliated against him for exercising his rights under the ADA. Like Petitioner, Salitros' claim arose under 42 U.S.C. § 12203. *Id.* at 569. On appeal, Chrysler argued "that there was no evidence to support the award of punitive damages under the standard adopted for liability under 42 U.S.C. § 1981a(b)(1)", but it was rejected by the court. *Id.* at 570. In addition, the court stated that its reasoning also "leads us to deny Chrysler's separate argument that the district court erred in submitting punitive damages to the jury." *Id.* As a result, the Eighth Circuit held that punitive damages are an appropriate remedy for a retaliation claim under the ADA. Therefore, the Seventh Circuit's reliance on *Brown*, a district court decision ignored by its own circuit court, is misplaced.

Likewise, the Eighth Circuit also affirmed a jury verdict awarding damages for lost wages, compensatory damages and punitive damages against an employer for retaliation under the ADA in another decision after *Brown* in *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001). Accord, *Stafine v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001.) In *Foster*, the Court expressly found that the trial court had correctly instructed the jury on "the relevant [ADA] law for retaliation and damages" which included punitive damages. *Id.* at 1197-98. It is important to note that the Eighth Circuit's decisions in *Salitros*, *Foster* and *Stafine* were issued not only after the Missouri district court's contrary decision in *Brown*, but also after the contrary decisions within the same circuit by Kansas district courts in *Sink v. Wal-Mart Stores*, 147 F. Supp. 2d 1085 (D. Kans. 2001) and *Boe v. AlliedSignal*, 131 F. Supp. 2d 1197 (D. Kans. 2001). (*See* App. 7a.) Both of the Kansas district court

decisions were cited with approval by the Seventh Circuit in this case. *Id.* While the precise issue of whether a plaintiff is entitled to recover compensatory and punitive damages for a retaliation claim under the ADA was not specifically analyzed in *Salitros* or *Foster*, it is clear that the trial courts in those cases and the Eighth Circuit confirmed that they are indeed recoverable, squarely in conflict with the Seventh Circuit. Moreover, the *Foster* court held that the district court's jury instructions regarding retaliation and damages were proper:

> The [district] court correctly instructed the jury that Foster had to prove that she had an objectively reasonable belief that Time Warner's treatment of Terry violated the ADA, not that it actually was in violation of the law. The jury was instructed that it should determine whether Foster had a reasonable good faith belief that Terry was a qualified individual entitled to a reasonable accommodation which was not an undue hardship, and ultimately if she engaged in protected conduct. The court also correctly used the *Kolstad* standard to instruct the jury on *punitive* damages . . . The instructions on Foster's claim of *retaliation* and *punitive* damages *adequately stated the law.* 250 F.3d at 1198. (Emphasis added.)

Finally, the court stated that "the defense to damages instruction in 42 U.S.C. § 1981a(a)(3) requested by Time Warner was not appropriate because Foster's claim was for retaliation under 42 U.S.C. § 12203(a)," as was Petitioner's claim here. *Id.*

2. *The Second Circuit —*

In *Muller v. Costello*, 187 F.3d 298 (2nd Cir. 1999), the Second Circuit — contrary to the Seventh Circuit's decision below — affirmed the jury's finding of liability and compensatory damages in favor of the plaintiff solely on his claim of retaliation in violation of the ADA, 42 U.S.C. § 12203. On appeal, the *Muller* court agreed with the defendant's argument that the evidence was insufficient to find that the plaintiff suffered from a disability within the meaning of the ADA. 187 F.3d at 298. Nonetheless, the court affirmed the jury's award of compensatory damages as "justified solely on the retaliation finding." *Id.* at 314. The court also stated that it is "appropriate to apply the framework used in analyzing retaliation claims under Title VII [42 U.S.C. § 2000e-5] in analyzing a claim of retaliation under the ADA." *Id.* at 311. See also *Lovejoy–Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir. 2001). The "framework", of course, is the same as that reviewed by the Seventh Circuit below.

3. *The Tenth Circuit —*

In *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999), the Tenth Circuit, like the Second and Eighth Circuits, also affirmed a jury verdict awarding both compensatory and punitive damages on a claim of disability discrimination and retaliation in violation of the ADA. Citing this Court's decision in *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 119 S. Ct. 2118 (1999) regarding the issue of punitive damages in ADA cases under 42 U.S.C. § 1981a(a)(1), the court of appeals extensively analyzed the standard of proof for punitive damages. In *Wal-Mart Stores*, the court of appeals also found that the "punitive damages

analysis is the same for Title VII [42 U.S.C. § 2000e-5] and ADA claims. *See* 42 U.S.C. 1981[a](a)(2)." 187 F.3d at 1245, n.2.

As discussed above, the Second, Eighth and Tenth Circuits have expressly allowed plaintiffs in retaliation cases under the ADA to seek and recover both compensatory and punitive damages in trials by juries. Because of this clear conflict between these courts of appeals and the Seventh Circuit, together with the uniform decisions in the district courts outside the Eighth Circuit, as discussed below, certiorari is warranted to settle the issue.

4. *The District Courts Outside the Eighth Circuit —*

Although the remaining circuits have yet to address appeals from jury verdicts awarding plaintiffs compensatory and punitive damages in ADA retaliation cases, other district courts within the First, Second, Fourth, Sixth and Ninth Circuits have reached results which conflict with the Seventh Circuit. Indeed, the only federal decisions which are consistent with the Seventh Circuit's decision are from the Missouri and Kansas district courts issued *before* the Eighth Circuit's *Salitros*, *Foster* and *Stafine* decisions in 2002.

• In the First Circuit, the Maine district court held that an ADA plaintiff claiming retaliation was entitled to a trial by jury for damages. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Me. 1994). The district court examined the same issue presented by Petitioner here regarding a claim for retaliation under the ADA and analyzed the applicable statutes. The defendant had filed a "Motion to Define Scope

of Jury Trial under the ADA." 859 F. Supp. at 605. The court stated, "[t]he Seventh Amendment preserves the right to trial by jury in 'suits at common law.' 'Suits at common law' refers to 'suits in which *legal* rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered.'" *Id.* (citing *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990)). (Emphasis in original.) Therefore, the court implied that the plaintiff had a constitutional right to a jury trial for an ADA retaliation claim. The court also stated that "[i]f an employer violates Title I of the ADA, the employees are entitled to those remedies available to employees under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117." *Id.* It was noted that before 1991, Title VII authorized courts to enjoin unlawful employment practices and grant such remedies as reinstatement, hiring of employees and back pay in accordance with 42 U.S.C. § 2000e-5(g) and stated that these remedies "are equitable, and have not historically required trial by jury." (*Id.*) However, the *Braverman* court continued and held:

> The Civil Rights Act of 1991, however, broadened the relief available for an employer's intentional discrimination. Employees who prevail on their claims may now recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(2). Further, if a complaining party seeks compensatory and punitive damages, she may demand and receive a trial by jury. 42 U.S.C. § 1981a(c)(1). *Id.*

Therefore, the court concluded that because the plaintiff's ADA retaliation claim sought compensatory and punitive damages, in addition to the traditional Title VII damages such

as back pay, benefits, and reinstatement or front pay, he was "entitled to a jury trial on liability and damages." *Id.*

• In the Second Circuit, the United States District Court for the Western District of New York resolved the perceived statutory conflict regarding the availability of compensatory and punitive damages (and hence a right to a trial by jury) to an ADA plaintiff claiming retaliation. *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003). There the court examined precisely the issues raised in the courts below, namely BOA's motion to strike Petitioner's jury demand in an ADA retaliation suit, based upon the argument that compensatory and punitive damages are not recoverable. The *Lovejoy* court noted that the defendant relied primarily upon *Brown v. City of Lee's Summit, Mo., supra*, 1999 WL 827768 (W.D. Mo. 1999), the same decision adopted by the Seventh Circuit in Petitioner's case. (*See* App. 7a.) 242 F. Supp. 2d at 240-41.

The *Lovejoy* court recognized that the *Brown* court had concluded that Congress did not intend to permit a plaintiff suing for employment retaliation under 42 U.S.C. § 12203(a) to recover compensatory or punitive damages. *Id.* The *Lovejoy* court also noted that two other district courts had reached different results on the same issue. *Id.* (citing *Boe v. AlliedSignal, Inc.*, 131 F. Supp. 2d 1197 (D. Kan. 2001) (relying on *Brown* and holding that compensatory and punitive damages are not recoverable for ADA retaliation) and *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196 (E.D. Cal. 1997) (holding that compensatory and punitive damages are recoverable and a jury trial is available.) (*See also* App. 7a.)

The *Lovejoy* court disagreed with both the *Brown* and *Boe* decisions, which were cited with approval by the Seventh Circuit in Petitioner's case (at App. 7a), and held that the plaintiff was entitled to recover compensatory and punitive damages under her ADA retaliation claim and, therefore, also was entitled to a jury trial. *Lovejoy*, 242 F. Supp. 2d at 240-241. The *Lovejoy* court rejected the defendant's reliance upon *Brown* because of the more recent Eighth Circuit decisions:

> [M]ore recent decisions from the United States Court of Appeals for the Eighth Circuit (in which the Western District of Missouri is located) have recognized the appropriateness of having a jury consider ADA retaliation claims. *See, e.g., Foster v. Time Warner Entertainment Company, L.P.*, 250 F.3d 1189 (8th Cir. 2001) (affirming jury verdict finding that the plaintiff was terminated in retaliation for opposing unlawful discrimination under the ADA, and awarding lost wages and compensatory and punitive damages); *see also Stafine v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) (affirming jury verdict in favor of employer on claims of disability discrimination and retaliation for filing EEOC complaint). In light of these circuit court decisions, NOCO's reliance on the district court's holding in *Brown* is unconvincing.

In addition, the *Lovejoy* court noted that "courts within the Second Circuit have routinely allowed juries to decide ADA retaliation claims." *Lovejoy*, 242 F. Supp. 2d at 240-41. In fact, the *Lovejoy* court analyzed and based much of its reasoning on the Second Circuit's decision in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999). *Id.* (*See also* App. 7a.) Finally, the *Lovejoy* court relied upon the Second Circuit's decision remanding the

case for further proceedings, which contained several references indicating that the circuit court's intent was that *Lovejoy's* retaliation claim be tried by a jury. *Id. See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir. 2001) (a "*jury* could reasonably find" that NOCO's statements in a January 1994 letter provided a basis for retaliation claim; "[a] *jury* could conclude" that plaintiff was suspended without pay for a week shortly after filing the EEOC complaint; time span between filing of EEOC complaint and suspension "is short enough to permit a *jury* to infer a causal connection" between protected activity and adverse employment action). (Emphasis added.)

• In the Fourth Circuit, a district court also held that a jury trial on compensatory damages is available to a plaintiff on her ADA retaliation claim after tracing the legislative history of the ADA and the provisions of Title VII. *Rhoads v. FDIC*, 2002 WL 31755427 (D. Md. 2002). The *Rhoads* court relied in part on *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999), holding that the remedies for a violation of 42 U.S.C. § 12203 in the employment context are set forth in 42 U.S.C. § 12117.

• In the Sixth Circuit, the United States District Court for the Eastern District of Michigan held that general damages were available under the ADA's antiretaliation provisions. *Niece v. Fitzner*, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996). In *Niece*, the court noted that this Court in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992) found "general damages available under Title IX of the Civil Rights Act of 1964. Consequently compensatory damages are available to plaintiffs asserting claims under 42 U.S.C. §§ 12132 and 12203." 922 F. Supp. at 1219.

• In the Ninth Circuit, the Eastern District of California analyzed the ADA remedial scheme as expanded by 42 U.S.C. § 1981a and concluded that a plaintiff could recover compensatory and punitive damages in a retaliation suit. *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196, 201 (E.D. Cal. 1997). There the court held that the plaintiff could recover compensatory and punitive damages in his ADA retaliation suit because "where Congress provides a cause of action, a federal court must presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." (*citing Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992).). In addition, the court stated, "it appears to the court that Congress has provided for the recovery of both general and punitive damages for a willful violation of the anti-retaliation provisions of the ADA." *Id.* The court stated that this conclusion is buttressed by the established principle that:

> 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1964)).

The *Ostrach* court determined that the retaliation provision of the ADA, 42 U.S.C. § 12203(a), extended the remedies available pursuant to 42 U.S.C. §§ 12117, 12133 and 12188, to an aggrieved plaintiff. *Id.* The court then noted that 42 U.S.C. § 1981a(a)(2) provided:

> [i]n an action brought by a complaining party under the powers, remedies and procedures set forth in § 716 or 717 of the Civil Rights Act

> of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990) (42 U.S.C. §12117(a)) . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages. . . . *Id.*

Finally, the *Ostrach* court noted that "complaining party" is defined in 42 U.S.C. § 1981a(d)(1)(b) to "include persons who bring actions under Title I of the Americans with Disabilities Act." *Id.* at 201. Accordingly, the court found that retaliation suits under the ADA allowed for recovery of compensatory and punitive damages:

> The Civil Rights Act of 1991, however, broadened the relief available for an employer's intentional discrimination. Employees who prevail on their claims may now recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(2). Further, if a complaining party seeks compensatory and punitive damages, she may demand and receive a trial by jury. 42 U.S.C. § 1981a(c)(1). *Id.*

Therefore, the court held that because the plaintiff's ADA retaliation claim sought compensatory and punitive damages, in addition to the traditional Title VII damages such as back pay, benefits, and reinstatement or front pay, he was "entitled to a jury trial on liability and damages." *Id.*

As the several circuit court and district court rulings demonstrate, the question of whether a plaintiff claiming retaliation against an employer under the ADA can recover compensatory and punitive damages with a right to a trial by jury, irreconcilable conflict of previously settled law under

a 14-year-old statute has resulted. This conflict between the Seventh Circuit, which relied upon the Missouri district court decision in *Brown*, overruled *sub silentio* by later Eighth Circuit decisions, stems from a fundamental disagreement over the breadth of the damage remedies available to an ADA claimant under 42 U.S.C. § 2000e-5 as amended by 42 U.S.C. § 1981a. There is no realistic probability that the conflict will disappear without an interpretation from this Court. Therefore, further review is now needed.

II. THE ISSUES RAISED ARE RECURRING AND CRITICAL FOR THOUSANDS OF ADA RETALIATION CLAIMANTS

Whether Congress intended to include compensatory and punitive damages as additional remedies available under the ADA's antiretaliation scheme, 42 U.S.C. § 2000e-5 as amended by 42 U.S.C. § 1981a, is an important issue of federal law. At least equally significant is the ADA plaintiff's Seventh Amendment right to a trial by jury, an obvious cornerstone of our judicial system. As the above opinions illustrate, given the number of "complaining parties" who file employment retaliation claims under the ADA every year, this issue will recur. As a result, the courts will continue to reach different conclusions under the diverse interpretations of the Seventh Circuit below as well as those like *Brown*, *Salitros*, *Niece*, *Ostrach* and *Muller*, resulting in a disparate application of the interrelationships among the remedial statutes applicable to the ADA.

According to E.E.O.C. statistics, more than 189,000 ADA charges were received by it between July 26, 1992, and September 30, 2003. (Source: ADA Charges, FY1992-FY2003, at *www.eeoc.gov/stats/ada-charges.html*.) More

than 15,000 ADA charges were filed by claimants in fiscal year 2003 alone. *Id.* Given the number of ADA charges filed with the E.E.O.C. and the continuous burgeoning of employment discrimination litigation in the federal courts, review should not be delayed.

III. THE DECISION BELOW IS MANIFESTLY INCORRECT

The Court's review is also warranted because the Seventh Circuit's decision that Petitioner is not entitled to compensatory and punitive damages with a corresponding right to a trial by jury is manifestly incorrect.

1. The Seventh Circuit stands alone among the several circuits which permit juries to award compensatory and punitive damages under 42 U.S.C. § 12203 to ADA plaintiffs claiming retaliation by their employers. The reasoning of the sole district court case upon which the Seventh Circuit relies, *Brown v. City of Lee's Summit*, is ignored by later decisions of the Eighth Circuit permitting juries to award those damages as provided by 42 U.S.C. § 1981a. The more logical and compelling rationale is contained in *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003).

2. In a discrimination claim that involves retaliation, it is clear that if any claim warrants compensatory and punitive damages, it is the retaliation claim. Retaliation constitutes malicious conduct against an employee for engaging in a protected activity like filing a charge of discrimination with the EEOC. If injunctive relief is the only remedy for such conduct, the employer has a license to retaliate, and, based on the Seventh Circuit's decision, it cannot be punished to any greater extent than the original discrimination claim.

In other words, the Seventh Circuit's decision against Petitioner and its interpretation of the expanded remedies under the ADA by 42 U.S.C. § 1981a is a perverse — indeed backwards — reading of the available remedies for an employer's retaliation. If compensatory and punitive damages are available for routine disability or lack of reasonable accommodations claims, then surely they are available for intentional retaliatory actions taken by an employer under the penumbra of 42 U.S.C. § 2000e-5.

3. The legislative history of the ADA supports Petitioner's claim for a trial by jury on the issue of compensatory and punitive damages. In *Rhoads v. Federal Deposit Ins. Corp.*, 2002 WL 31755427 (D. Md. 2002), the district court examined the legislative history of the ADA and the Fourth Circuit's precedent for available damages:

> The Fourth Circuit, however, in *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999), noted that the remedies available for a violation of 42 U.S.C. § 12203 in the employment context are set forth in 42 U.S.C. § 12117, which 'specifically makes the remedies available under Title VII applicable to actions under the ADA.' See also *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001) (stating that Congress evinced its knowledge of the parallel nature of Title VII and the ADA when it provided that '"the powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures [the ADA] provides"' (quoting 42 U.S.C. § 12117(a)). *Id.*

The legislative history of the ADA also supports the proposition that damages available under Title VII of the 1964

Civil Rights Act are also available in actions brought under the ADA. One court noted that the ADA committee reports "clearly indicate Congress' intent to parallel the powers, remedies and procedures developed by case law under Title VII." *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1044-45 (N.D. Ill. 2000). In fact, the *Baumgardner* court noted that a committee report stated that "'if the powers, remedies, and procedures change in Title VII of the 1964 Act, they will change *identically* under the ADA for persons with disabilities . . . the Committees' intent is that the remedies of Title VII, currently and as *amended* in the future, will be applicable to persons with disabilities.'" *Id.* (Emphasis added). (quoting H.R. REP. No. 101-485, pt. 3, at 48 (1990)). Accord, *Rhoads*, 2000 WL 31755427 at 1.

4. In a recent law review article, the commentator addressed and analyzed the issue of whether a plaintiff alleging retaliation under the ADA may recover compensatory and punitive damages under 42 U.S.C. § 1981a and whether it encompasses 42 U.S.C. § 12203, thus providing a plaintiff with a right to a jury trial. Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L. & Pol'y Rev. 241, 262 (2003). The article examines and analyzes some of the contradictory case law cited in this Petition. Professor Weber concludes that compensatory and punitive damages should be available to those who claim retaliation:

> The Civil Rights Act of 1991 makes direct reference to Title I and II provisions rather than to section 12203 which is found in Title V. Nevertheless, the incorporation-by-reference pathway leads in a straight line from ADA Title V's section 12203 to ADA Titles I and II to the

> Civil Rights Act of 1964 to the Civil Rights Act of 1991, placing section 12203 squarely within section 1981a. The conclusion that damages lie at the end of this chain is buttressed by the principle that courts construing the remedial provisions of federal statutes should assume the existence of the full range of remedies, including damages relief.
>
> * * * *
>
> The cross referenced statute [1964 Civil Rights Act] can hardly be expected to contain language directly covering the statute doing the cross-referencing. The whole point of incorporating another law by reference is that the incorporated law does not include the conduct covered by the law and does not itself refer to the provision that is doing the cross-referencing. Accordingly, *Ostrach* [*v. Regents of Univ. of California*, 957 F.Supp. 186 (E.D. Cal. 1997)], has the better of the remedies argument, and damages should be available for violations of section 12203, both those relating to coercion and those relating to retaliation.

5. Other courts have held that Title VII's remedies are the same remedies available for an ADA retaliation violation. *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999) ("The remedies available for a violation of the antiretaliation provision of the ADA in the employment context are set forth in 42 U.S.C.A. §12117.") *Id.* As the *Baird* court observed, Section 12117 specifically makes the remedies available under Title VII applicable to actions under the ADA, citing 42 U.S.C. § 12117(a) (which states that "[t]he powers, remedies, and procedures set forth in section . . . [2000e-5]

. . . of this title shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability"). *See also Veneziano v. Long Island Pipe Fabrication & Supply Corp.*, 238 F. Supp. 2d 683, 689 (D.N.J. 2002) ("42 U.S.C. §12203(c) directs a person alleging a retaliation claim in the employment context of 42 U.S.C. §12117 to find the remedies available to him or her for a violation of Section 12203. Section 12117, in turn, refers to the remedial provision of Title VII.").

6. It is undisputed that the Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides that compensatory and punitive damages are available for Title VII violations. *David v. Caterpillar, Inc.*, 324 F.3d 851, 865 (7th Cir. 2003) ("Title VII authorizes an award of punitive damages when a plaintiff demonstrates that the employer has engaged in intentional discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' 42 U.S.C. § 1981a(b)(1)."); *Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001) (upholding award of $20,000 in compensatory damages for Title VII retaliatory discharge). Accord, *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998) (Title VII plaintiff can recover compensatory damages under 42 U.S.C. § 1981a). Therefore, it is logical that if compensatory and punitive damages are available under Title VII for a retaliatory discharge, then they also are available to Petitioner under the ADA because the ADA remedies are the same as those under Title VII, 42 U.S.C. § 2000e-5, and its amendments like 42 U.S.C. § 1981a. There is a long-established principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1964). As the

Court has more recently explained, where Congress provides a cause of action, a federal court must "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 112 S.Ct. 1028, 1032 (1992).

As it stands now, plaintiffs claiming retaliation under the ADA in the Seventh Circuit cannot recover compensatory and punitive damages and do not have a right to a trial by jury while those in other circuits are so entitled. It is clear that the 1991 Civil Rights Act, 42 U.S.C. §§ 1981a(a)(1) and (2), expanded the available remedies to a plaintiff seeking all remedies under 42 U.S.C. § 2000e-5 like Petitioner here, including compensatory and punitive damages. Therefore, given the profound impact of depriving ADA plaintiffs of their Seventh Amendment right to a jury trial, the split in the circuits on settled ADA law and the resulting disparate application of the ADA retaliation remedies throughout the country, the Court should take this opportunity now to resolve this critical damages and jury trial question.

CONCLUSION

This petition for a writ of certiorari should be granted.[1]

Respectfully submitted,

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April 19, 2004

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1. In view of the unsettled law now created by the decision below, Petitioner respectfully suggests, in the alternative, that the Court invite the Solicitor General to file a brief expressing the views of the Equal Employment Opportunity Commission.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 20, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3662

COLLEEN P. KRAMER,

Plaintiff-Appellant,

v.

BANC OF AMERICA SECURITIES, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 6768—**James B. Zagel**, *Judge*

ARGUED SEPTEMBER 17, 2003—DECIDED JANUARY 20, 2004

Before RIPPLE, MANION, and WILLIAMS, *Circuit Judges*.

MANION, *Circuit Judge*. Colleen Kramer sued her former employer, Banc of America Securities, LLC ("BOA"), for, among other things, retaliatory discharge in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA"). After a bench trial, the district court found in favor of BOA. On appeal we must determine whether

compensatory and punitive damages are available as a remedy for a retaliation claim against an employer under the ADA. We affirm the district court's decision to deny consideration of compensatory and punitive damages, and its decision to conduct the trial in this case without a jury.

I.

Colleen Kramer worked in BOA's Chicago, Illinois office from October 1995 until October 1999. Her responsibilities included heading a team responsible for the structuring of loans for middle market companies so that the loans could be syndicated to other financial institutions. In October 1998, BOA and NationsBank merged. As a result of this merger, Kramer began reporting to a new supervisor, Mary Lynn-Moser.

Although Moser was impressed by the performance of Kramer's team during early 1999, Moser was critical of Kramer's job performance, particularly Kramer's leadership skills and interpersonal skills. At the end of May 1999, Moser replaced Kramer as team leader with another employee, although Kramer retained her salary and title as managing director. Moser also gave Kramer a memorandum critiquing Kramer's performance and stating that Kramer would need to improve her performance within the next 90 days.

In June 1999, Kramer responded to the demotion and memorandum through a letter from her lawyer. The letter demanded that she be reinstated as team leader and also revealed that Kramer suffered from multiple sclerosis. This was the first notice that BOA had of Kramer's disease.

A few months later, on September 1, 1999, Moser wrote another detailed memorandum that directed Kramer to, within 30 days, improve her performance in several specific areas or face termination of her employment. On September 24, 1999, Kramer filed a charge of disability discrimination and retaliation with the United States Equal Employment Opportunity Commission (the "EEOC"). Four days later, Kramer sent Moser and Moser's supervisor an e-mail message notifying them of her charge. On September 30, 1999, the EEOC issued Kramer a Notice of Right to Sue.

On October 7, 1999, Moser informed Kramer that her employment with BOA was terminated. A little more than a week later, on October 15, 1999, Kramer filed suit in the United States District Court for the Northern District of Illinois, alleging disability discrimination and retaliation under the ADA and a state law claim for intentional infliction of emotional distress. The complaint sought front pay, back pay, compensatory and punitive damages, reinstatement, and attorney's fees and costs.

On May 23, 2000, Kramer filed a second charge of discrimination with the EEOC. This charge included an allegation of retaliatory discharge. On June 13, 2000, the EEOC issued her a second Notice of Right to Sue. Kramer filed an Amended Complaint on May 2, 2001, in which she dropped her state law causes of action. Both Kramer's Complaint and Amended Complaint demanded a jury trial on all issues. BOA's Answer and Answer to the Amended Complaint also included demands for jury trial.

Appendix A

BOA filed a motion for summary judgment on all of Kramer's claims. On December 6, 2001, the district court granted summary judgment in BOA's favor on Kramer's disability claims, but denied BOA's motion with respect to Kramer's claim of retaliatory discharge. Trial on Kramer's remaining claim was scheduled for May 13, 2002.

On May 3, 2002, BOA filed a Motion to Exclude Compensatory and Punitive Damages and Strike Plaintiff's Jury Demand. In its motion, BOA asserted that compensatory and punitive damages are not recoverable on a claim of retaliation under the ADA. In addition, BOA argued that, because Kramer was not entitled to recover compensatory and punitive damages under the ADA, Kramer had no statutory right to a jury trial.

The district court granted BOA's motion on May 10, 2002. The court found that compensatory and punitive damages were not available as a remedy and that Kramer was not, therefore, entitled to a jury trial. The district court also refused to impanel an advisory jury.

The district court proceeded with a six-day bench trial on Kramer's retaliation claim, at the conclusion of which the court ruled in favor of BOA. The district court entered written findings of fact and conclusions of law on September 11, 2002. This appeal followed.

Appendix A

II.

On appeal, Kramer argues that the district court erred in ruling that the she was not entitled to seek compensatory and punitive damages for a claim of retaliation under the ADA. In a related argument, Kramer claims that, because she was entitled to seek compensatory and punitive damages, she was entitled to a jury trial and it was reversible error on the part of the district court to strike her jury demand. Kramer also maintains that, independent of her claim for compensatory and punitive damages, she was entitled to a jury trial because BOA consented to a jury.[1]

A. Compensatory and Punitive Damages

Kramer contends that she is entitled to seek compensatory and punitive damages for her claim of retaliation under the ADA. This is a matter of statutory interpretation which is subject to de novo review. *Jones v. R.R. Donnelley & Sons, Co.*, 305 F.3d 717, 722 (7th Cir. 2002).

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1. Kramer also claims that she had a constitutional right to a jury trial, even if this court finds that she was not entitled to recover compensatory and punitive damages. Kramer provides no legal support for the one sentence in her brief dedicated to this argument. The absence of any supporting authority or development of an argument constitutes a waiver on appeal. *See United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.1991) ("We have repeatedly made clear that perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).").

Appendix A

Remedies available to a party making a retaliation claim against an employer under the ADA are first determined by reference to 42 U.S.C. § 12117. Section 12117, in turn, provides that the available remedies are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-4 through e-9, 42 U.S.C. § 12117(a). Section 2000e-5(g)(1) provides that a court may order certain equitable relief including, but not limited to, back pay, but it does not provide for compensatory or punitive damages.

However, the 1991 Civil Rights Act, 42 U.S.C § 1981a(a)(2), expands the remedies available under § 2000e-5(g)(1) in certain circumstances, to provide for compensatory and punitive damages. Specifically, § 1981a(a)(2) provides, in pertinent part, that:

> [i]n an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . under . . . section 102 of the [ADA] or committed a violation of section 102(b)(5) of the [ADA], against an individual, the complaining party may recover compensatory and punitive damages. . . .

42 U.S.C. § 1981a(a)(2)

Kramer argues that § 1981(a)(2) permits a plaintiff making a claim of retaliation against an employer under the ADA to recover compensatory damages. This question appears to be one of first impression for federal circuit courts. We have not found, and the parties have not cited, any federal circuit courts that have considered this question. Kramer

directs our attention to the decisions of three circuits—the Second, Eighth and Tenth Circuits—that have affirmed jury verdicts where compensatory and punitive damages had been awarded on ADA retaliation claims. *See, e.g., Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999). These decisions focused on whether there was sufficient evidence to award compensatory and punitive damages, but none examined the legal question of whether such damages were authorized for an ADA retaliation claim. The district courts that have addressed the question are split. *Compare Sink v. Wal-Mart Stores*, 147 F.Supp.2d 1085, 1100-01 (D. Kans. 2001) (compensatory and punitive damages are not available for retaliatory discharge claim), *Boe v. AlliedSignal Inc.*, 131 F.Supp.2d 1197, 1202-03 (D. Kans. 2001) (same), and *Brown v. City of Lee's Summit*, 1999 WL 827768, *2-*4 (W.D. Mo. 1999) (same), *with Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d. 236, 240-41 (W.D.N.Y. 2003) (compensatory and punitive damages are available), *Rhoads v. FDIC*, 2002 WL 31755427, *1-*2 (D.Md. 2002) (same), and *Ostrach v. Regents of the University of California*, 957 F.Supp. 196, 200-01 (E.D. Cal. 1997) (same).

The district court's analysis in *Brown v. City of Lee's Summit* is thorough and particularly persuasive. We agree with that court's conclusion that "a meticulous tracing of the language of this tangle of interrelated statutes reveals no basis for plaintiff's claim of compensatory and punitive damages in his ADA retaliation claim." 1999 WL 827768, at *3.

We thus conclude that the 1991 Civil Rights Act does not expand the remedies available to a party bringing an ADA retaliation claim against an employer and therefore compensatory and punitive damages are not available. A close reading of the plain language of § 1981a(a)(2) makes it clear that the statute does not contemplate compensatory and punitive damages for a retaliation claim under the ADA. Section 1981a(a)(2) permits recovery of compensatory and punitive damages (and thus expands the remedies available under § 2000e-5(g)(1)) only for those claims listed therein. With respect to the ADA, § 1981a(a)(2) only lists claims brought under §§ 12112 or 12112(b)(5). Because claims of retaliation under the ADA (§ 12203) are not listed, compensatory and punitive damages are not available for such claims. Instead, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in § 2000e-5(g)(1). *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

The decisions of the district courts finding that compensatory and punitive damages are available are not persuasive. In *Lovejoy-Wilson v. Noco Motor Fuels, Inc.* and *Rhoads v. FDIC,* neither district court engaged in an analysis of § 1981a(a)(2). Rather, *Lovejoy- Wilson* relies in part on the fact that "courts within the Second Circuit have routinely allowed juries to decide ADA retaliation claims." 242 F. Supp. 2d at 240. As we pointed out above, the Second Circuit in *Muller* did not address the underlying question of

whether compensatory and punitive damages are available. The decision in *Rhoads* relied on the legislative history of the ADA. 2002 WL 31755427, at *1. We need not resort to a committee report's summary of legislative intent when the statute is specific. *See McCoy v. Gilbert,* 270 F.3d 503, 510 n.4 (7th Cir. 2001) (citing *United States v. Hudspeth,* 42 F.3d 1015, 1022 (7th Cir. 1994) (en banc)) ("We need never consider legislative history when interpreting an unambiguous statute."). The plain text of § 1981a(a)(2) is clear. *See Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted). Because the plain language of § 1981a(a)(2) limits its application to specific claims, it is inappropriate to expand the scope of the statute in reliance on legislative history to include claims for retaliation by an employer under the ADA.

Finally, we disagree with the district court's analysis in *Ostrach v. Regents of the University of California.* In that case, the court quotes § 1981a(a)(2) as follows:

> [i]n an action brought by a complaining party under the powers, remedies and procedures set forth in § 716 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages. . . .

Ostrach, 957 F. Supp. at 201. Significantly, what is omitted by the first set of ellipses is crucial to the question at issue. The omitted language lists the specific statutory sections for which a party may recover compensatory and punitive damages. The section providing an action for retaliation, § 203 of the ADA (42 U.S.C. § 12203), is not listed.

B. Kramer's Right to a Jury Trial

Because Kramer was not entitled to recover compensatory and punitive damages, she has no statutory or constitutional right to a jury trial. The only remedies Kramer (or any plaintiff bringing a claim of retaliation against an employer under the ADA) was entitled to seek were equitable in nature. *See* 42 U.S.C. § 2000e-5(g)(1) (stating that where an employer has engaged in an unlawful employment practice, a court may issue an injunction, reinstate the plaintiff employee, order back pay, or award "any other *equitable relief* as the court deems appropriate") (emphasis added). There is no right to a jury where the only remedies sought (or available) are equitable. *See, e.g., Marseilles Hydro Power, LLC v. Marseilles Land and Water Co.*, 299 F.3d 643, 648 (7th Cir. 2002) ("If the only relief sought is equitable . . . neither the party seeking that relief nor the party opposing it is entitled to a jury trial."). We need not, therefore, address Kramer's argument that it was reversible error for the district court to strike her demand for a jury trial; Kramer had no statutory right to a jury trial.

We need, however, to address Kramer's argument that, independent of whether she was entitled to recover compensatory and punitive damages, she was entitled to a

jury trial based on BOA's consent as evidenced by its demand for a jury trial in its answer to the Complaint and Amended Complaint. Federal Rule of Civil Procedure 39(c) addresses jury trials by consent.

> (c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Fed. R. Civ. P. 39(c). This court has held that issues of back pay and front pay are not beyond the scope of parties' consent to a jury trial. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000).

Kramer claims that BOA consented to a jury trial when it included a demand for a jury trial in its answer to her Complaint and Amended Complaint. Once BOA consented, Kramer argues, citing Fed. R. Civ. P. 38(d), it could not withdraw such consent without Kramer's permission. Because she did not consent to such a withdrawal—she opposed BOA's motion to strike her jury demand—she claims the court erred in granting BOA's motion. The district court disagreed. The court doubted that BOA had actually consented to a jury trial on the issues of front and back pay but, regardless, found that it was not too late for BOA to withdraw its consent to a jury trial. The court also declined

to impanel an advisory jury. The court saw "no point to the expense and time of an advisory jury, particularly on an issue that I suspect I need no advice."

In order to determine whether BOA properly withdrew its consent to a jury trial it is important to review the events leading up to and including BOA's motion. Kramer's Complaint and Amended Complaint included a request for remedies (compensatory and punitive damages) that, had she been entitled to recover such remedies, would have entitled her to a jury trial as a matter of right. *See* 42 U.S.C. § 1981a(c)(1) ("If a complaining party seeks compensatory or punitive damages under this section any party may demand a trial by jury."). By including a demand for a jury in her Complaint and Amended Complaint, Kramer successfully exercised her right to have her claim heard by a jury. Fed. R. Civ. P. 38(b). BOA also made a demand for a jury trial in its answer to the Complaint and the Amended Complaint, though strictly speaking, such a demand was not necessary. The demand for a jury by one party is generally sufficient *where the jury trial is of right.*

Shortly before trial, BOA made a motion to exclude compensatory and punitive damages. The district court granted this motion. In this opinion we affirm the district court's decision. After the district court granted the motion, Kramer had no *right* to a jury trial. As we have discussed, Kramer was entitled to have her claim of retaliation (for which she was entitled only to equitable remedies) heard by a jury only if BOA consented and the district court agreed.

BOA also moved at the same time to strike Kramer's jury demand. In light of the district court's decision that there was no statutory right to a jury trial, this motion was proper. Federal Rule of Civil Procedure 39(a) provides that when a jury trial has been demanded and designated on the docket as a jury trial, the trial shall be heard by a jury, "*unless* . . . (2) the court *upon motion* or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." Fed. R. Civ. P. 39(a)(2) (emphasis added).

Kramer's reliance on Rule 38(d) for the proposition that BOA could not withdraw a demand for a jury trial without her consent, is misplaced. Rule 38, as is made clear by its caption, is concerned with jury trials of right. Rule 38(d)'s requirement that the other parties consent to a withdraw of a demand permits those other parties to rely on the jury demand to protect their right to a jury trial. *See Partee v. Buch*, 28 F.3d 636, 636 (7th Cir. 1994) ("[T]he plaintiff . . . was entitled to rely on the defendant's jury demand and was not required to file a separate jury demand on his own."); 9 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2318 (3d. ed. 1995). Assuming Kramer had a right to a jury trial (for instance, if she was actually entitled to recover compensatory and punitive damage), BOA could not withdraw a demand for a jury trial. But Kramer had no right to a jury trial and there is no restraint in the text of Rule 39 on the ability of a party to withdraw its consent to a jury trial that is not of right. *See Thaler v. PRB Metal Products, Inc.*, 810 F. Supp. 49, 50 (E.D. N.Y. 1993) (rejecting plaintiff's argument that Rule 38(d) prohibits a party from withdrawing its consent to a jury trial that is not

of right and noting that "plaintiff cites no authority for the proposition that . . . consent cannot be withdrawn prior to trial").

The question then is whether BOA properly withdrew its consent to a jury trial. The district court expressed some doubt as to whether BOA had ever consented to a jury trial on Kramer's claims of front and back pay. We need not address this question, however, because it is clear that, to the extent BOA did consent to a jury trial, it withdrew that consent with its motion to strike Kramer's jury demand. BOA filed its motion to strike Kramer's jury demand two weeks prior to the trial. The district court determined that this was not too late in the litigation process and Kramer has provided no reason why she was prejudiced by a bench trial rather than a jury trial. *See CPI Plastics, Inc. v. USX Corp.*, 22 F.Supp.2d. 1373, 1378 (N.D. Ga. 1995) (granting motion to strike jury demand two weeks before a trial and noting no prejudice because there was no right to a jury, and a bench trial would require less preparation than a jury trial). We conclude that BOA properly withdrew its consent to a jury trial.[2]

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2. Of course not even the consent of BOA would have guaranteed Kramer a jury trial. A district court is not obligated to use a jury where one is not required even if both parties agree to use a jury. Rule 39(c) clearly contemplates a role for the court in deciding to use a jury where one is not required. *Merex A.G. v. Fairchild Weston Systems, Inc.*, 29 F.3d 821, 827 (2d Cir.1994) ("[W]hen both parties consent, Rule 39(c) invests the trial court with the discretion—but not the duty—to submit an equitable claim to the jury for a binding verdict. While the litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court.").

Appendix A

Compensatory and punitive damages are not available to a plaintiff bringing a claim of retaliation by an employer under the ADA. Without the right to recover compensatory and punitive damages, Kramer did not have a right to a jury trial and she was entitled to a jury trial only with the consent of BOA and the court. BOA properly withdrew its consent to a jury trial. For these and the foregoing reasons, we AFFIRM.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 20, 2004

BEFORE: Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable ANN CLAIRE WILLIAMS, Circuit Judge

No. 02-3662

COLLEEN P. KRAMER,

Plaintiff - Appellant

BANC OF AMERICA SECURITIES, LLC,

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 99 C 6768, James B. Zagel, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED SEPTEMBER 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 C 6768

Honorable James B. Zagel

COLLEEN P. KRAMER,

Plaintiff,

vs.

BANC OF AMERICA SECURITIES, LLC,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Banc of America Securities, LLC, ("BOA"), by its undersigned attorneys, submits the following proposed findings of fact and conclusions of law in accordance with the Court's May 22 oral ruling in favor of BOA at the close of the bench trial of Plaintiff Colleen P. Kramer's claim of retaliation under the Americans with Disabilities Act, 42 U.S.C. § 12203(a).

Appendix B

FINDINGS OF FACT

A. The Parties, Jurisdiction and Venue

1. BOA is a limited liability corporation with an office located at 231 South LaSalle Street in Chicago, Illinois. It is a subsidiary of Bank of America.

2. The Plaintiff, Colleen P. Kramer, (hereinafter "Ms. Kramer" or "Plaintiff') began working for BOA in October 1995 in Loan Syndications and Trading located in the Chicago office. Her duties included the structuring of loans for middle market companies so that the loans could be syndicated to other financial institutions.

3. On September 24, 1999, while employed at BOA, Ms. Kramer filed a charge of discrimination with the Equal Employment Opportunity Commission alleging discrimination and retaliation under the Americans with Disabilities Act 42 U.S.C. § 12101 et seq. ("ADA"). The EEOC issued a "Notice of Right to Sue." Ms. Kramer later timely filed a second charge of discrimination that claimed her termination on October 7, 1999, was discriminatory and retaliatory.

4. Plaintiff filed this action on October 15, 1999, asserting that BOA discriminated against her and retaliated against her in violation of the ADA because she has multiple sclerosis ("MS"), retained an attorney, and requested certain accommodations. She later filed an amended complaint that dropped pendent state law claims for negligent and intentional infliction of emotional distress.

5. The Plaintiff stated in her Complaint that this Court's jurisdiction is based upon 28 U.S.C. §§ 1331, 1337, 1343 and 1345.

6. Venue in this Court is based upon 28 U.S.C. § 1391 as Defendant resides in this state and district, and all acts complained of took place in this state and district.

B. Facts Related to Ms. Kramer's Employment and Termination

7. In October 1998, Bank of America and Nations Bank merged, after which the Chicago Middle Market Syndicated Finance Group was formed. Ms. Kramer was Team Leader of that group.

8. Prior to the merger, Ms. Kramer's supervisor was Mark Lies (hereinafter "Mr. Lies").

9. Following the merger, Ms. Kramer reported to Mary Lynn Moser, (hereinafter "Ms. Moser"), as her immediate supervisor. Ms. Moser was located in the Charlotte, North Carolina office of BOA and traveled to Chicago from time to time in the course of her supervisory duties for middle market syndicated finance operations.

10. As a result of post-merger changes in BOA's syndicated finance operations, Ms. Kramer was required to work with the Syndicate Desk, based in Charlotte, N.C., in order to structure syndicated loan transactions. Prior to the merger, BOA did not have a Syndicate Desk.

Appendix B

11. On March 2, 1999, Ms. Moser and Ms. Kramer met to discuss the progress of the Chicago Middle Market Syndicated Finance Group since the merger. At that time Ms. Moser expressed some concerns about Ms. Kramer's job performance, particularly leadership ability and interpersonal skills.

12. On April 22, 1999, Ms. Moser again met with Ms. Kramer and had another conversation regarding Ms. Kramer's job performance deficiencies, particularly with respect to her leadership ability as Team Leader of the Chicago Middle Market Syndicated Finance Group.

13. On May 28, 1999, again Ms. Moser met with Ms. Kramer and expressed concerns about her job performance both as a team leader and a senior structurer. On that date, Ms. Moser gave Ms. Kramer a detailed memorandum outlining the job performance concerns. The May 28 memo indicated that Ms. Kramer needed to improve her performance as a senior structurer in several specific areas – including supporting the middle market effort in the Midwest, utilizing the Distribution department to maintain investor relations, involving Syndicate Desk as much as possible in all proposals, communicating with superiors about her activities, promoting two-way communication with her teammates, participating in important internal meetings, and working as a collaborative team member.

14. The May 28 memo also stated Ms. Kramer's performance as a senior structurer, including her "social ability," would need to improve over the next 90 days. Ms. Moser indicated that a performance review would be conducted in 90 days.

15. At the end of May, Ms. Moser replaced Ms. Kramer as Team Leader, putting Eric Schubert, another employee from the Chicago office of BOA, into the Team Leader position. Thereafter, Ms. Kramer no longer had Team Leader responsibilities but she continued to work as a Senior Structurer in the Chicago group and retained her corporate title of Managing Director and her same salary and benefits.

16. On July 12, 1999, Glenn Stewart, who worked on the Syndicate Desk in Charlotte, N.C., sent an e-mail message to Ms. Moser in which he expressed disappointment with Ms. Kramer's job performance. He stated in the e-mail that Ms. Kramer had not provided him with "many of the basic structuring items that a good structuring person would do," such as information on comparable transactions in the industry, an analysis of cyclicality and an analysis of the company's capital expenditures. He also wrote that "she did not instill in me any confidence in her knowledge that I could rely on." He added that Ms. Kramer "also does not seem to grasp the team concept."

17. At the time Mr. Stewart wrote the July 12, 1999, e-mail message to Ms. Moser, he had no knowledge that Ms. Kramer has multiple sclerosis or that she had hired an attorney to represent her concerning her employment at BOA and had asked for accommodations under the ADA.

18. Ms. Moser discussed performance issues with Ms. Kramer at least three or four times over the next few months, leading up to September 1, 1999.

19. Also during the summer time period leading up to September 1, 1999, Ms. Kramer had disagreements with her supervisors, Mr. Schubert and Ms. Moser, regarding various issues on some proposed transactions. There is no dispute that these disagreements were unrelated to Ms. Kramer's alleged disability or her assertion of rights under the ADA.

20. In a memorandum to Ms. Kramer dated September 1, 1999, Ms. Moser expressed continuing concern with Ms. Kramer's job performance. This memo stated that if Ms. Kramer's job performance did not improve over the next 30 days, her employment would be terminated.

21. Ms. Moser conferred with her supervisor, Arrington Mixon (hereinafter "Ms. Mixon"), regarding the possible termination of Ms. Kramer. Ms. Mixon agreed with the decision to terminate Ms. Kramer's employment because Ms. Kramer had failed to improve her job performance.

22. On October 7, 1999, Ms. Moser informed Ms. Kramer that her job performance had not improved and that her employment with BOA was terminated.

C. Facts Concerning Ms. Kramer's Alleged Disability and Claim of Retaliation

23. Ms. Kramer was diagnosed with multiple sclerosis before she came to work for BOA.

24. She described its ordinary effects in 1998 as limiting some ability to use her left hand, but this manifestation of multiple sclerosis did not affect her ability to perform job functions.

25. Around October 1998 and continuing into 1999, Ms. Kramer began to experience dizziness and shakiness when deprived of sleep.

26. Her neurologist, Dr. Michael Minieka, testified that he examined Ms. Kramer in September 1998 and on May 27, 1999 and that at those times the symptoms of multiple sclerosis in Ms. Kramer would not have been obvious to people who lacked medical training.

27. In 1999, while employed at BOA, Ms. Kramer was able to run up to three to four miles, up to four times a week, although she testified that at times she was forced to walk part of the way during such exercise outings, which lasted an hour or more. In September 1999, a physical therapist told her to stop running such long distances after she started tripping and dragging her foot.

28. In June of 1999, Ms. Kramer retained a lawyer, Marc Sherman. The lawyer wrote a letter dated June 18, 1999, to Ms. Moser, which requested accommodations for Ms. Kramer's multiple sclerosis, noting that job-related stress was aggravating her condition. The letter requested that Ms. Kramer be excused from early morning meetings and be allowed to take rest breaks as needed.

29. Ms. Kramer did not tell Ms. Moser about her illness prior to her replacement as Team Leader, and Ms. Kramer admits that she cannot prove, at least has no direct evidence, that Ms. Moser knew of her illness at the time of the meeting and memo on May 28. It is quite clear from the evidence that Ms. Moser did not know of Ms. Kramer's multiple sclerosis

prior to the June 18, 1999 letter from Ms. Kramer's lawyer, Mr. Sherman.

30. On September 24, 1999, Ms. Kramer filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission and sent notification of this to Ms. Moser and Ms. Mixon via an e-mail message on September 28, 1999.

31. The Court dismissed Ms. Kramer's disability discrimination claim on summary judgment because she did not allege that her ability to perform a wide range of jobs was substantially limited, and under the ADA a plaintiff must show that there are significant limitations on the ability to perform a wide range of jobs.

32. Ms. Kramer does not dispute her ability to do the job. She was able to travel out of town on overnight trips. She testified during discovery, and later during trial, that her work performance was excellent up to the time of her termination, which really cuts against an argument that her illness significantly impacted her work capacity.

33. Plaintiff has conceded a lack of disability and lays her discharge to her failure with respect to deficits, if they exist, which are utterly unconnected to any sequelae of multiple sclerosis.[1]

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1. With respect to parenthetical references to trial testimony, these references should not be taken to mean that the Court reconsidered its ruling on summary judgment in light of the trial testimony. These references are made only for purposes of setting forth the context of the case.

34. On the issue of retaliation, it is undisputed that Ms. Kramer engaged in a protected activity and she suffered an adverse employment action. The issue is, whether she has proven causation between the protected activity and her termination.

35. On this issue, the Court denied summary judgment because it found that BOA's concern with Ms. Kramer's social ability which could justify her losing the Team Leader position was arguably a pretextual ground for her termination, at least after she lost supervisory responsibilities.

36. On its face there is nothing wrong with discharging someone because they do not work well with others, particularly since both parties agree that this syndicated finance business requires a lot of teamwork.[2]

37. There is a theme, present in her counsel's questioning of witnesses, that Ms. Kramer's inability to work within the team processes was not all that important because she was closing big deals on which the bank made a lot of money, winning out over competitive banks. Nonetheless, the

2. This is not inherent in the job. There was a time when a single individual at a bank, subject only to routine review by the bank's directors, could make a loan decision on his or her own hook and, though not common, could syndicate the loan, a process that bears a close resemblance to reinsurance or insurance pool practices. But, after a series of well-known failures in banking loan practices, the prevailing mode of loan operations requires lots of checks and balances and spreading of the risks. Banking regulators and bank shareholders pretty much dictate these practices. Ms. Kramer cannot really dispute that working well with others is important now in banking.

testimony establishes that the process, which requires teamwork — and the Court found that this is what was meant by "social ability" — is important.[3]

38. Ms. Kramer had been employed by BOA for three years prior to being a Team Leader in October, 1998, and there is really no evidence of concerns about her social ability at that time. In January of 1998 she was described as exhibiting an increased level of teamwork and clearly working better with her colleagues and her overall performance rating was "exceeds expectations." In January of 1999 she received an overall performance rating of "far exceeds" expectations and no concerns about "social ability" or the equivalent were expressed. So, Ms. Kramer has evidence that while her social ability may not have been characterized in prior evaluations as outstanding, it was, at least, acceptable.

39. No superior of Ms. Kramer knew of the fact that she had MS prior to June 18, 1999, when her lawyer sent a letter to them to inform them that she had MS. This is significant because the first formal display of BOA's displeasure with Ms. Kramer's performance was a memo of May 28, 1999. What is meant by "formal" is put into paper form, which is usually the kind of first step that leads to a process of significant change in the employee's performance or some form of sanction.

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3. Indeed, the person most critical of Ms. Kramer was her boss, Ms. Moser, who herself once received a communication from her superior that she, Ms. Moser, was unduly focused on the process failures of Ms. Kramer and that the important thing is that the deals were made.

40. There had been criticisms of Ms. Kramer's performance before the May 28, 1999 memo but the memo was clearly a watershed — the kind of document that tells any employee as intelligent as Ms. Kramer that her job might be on the line.

41. Ms. Moser had a rational basis for believing, and she, in fact, did believe that Ms. Kramer did have deficits in working with some people and at times may have caused valuable employees to leave the department or BOA itself.

42. There are employees, on all of the evidence before the Court, who did work well with Ms. Kramer and admired her. But some, quite clearly, did not.

43. The teamwork failings alleged by BOA are not said to run across the board; it was a sometime thing; she was a good team player at times, and a bad team player at others.

44. Testimony such as that of co-worker Christine Tierney's, as one example, establishes that Ms. Moser did not arrive at her opinion of Ms. Kramer's performance by making up comments of others — whether those comments are true in the objective sense or not true, the Court has no way of knowing and no need to know.

45. The testimony of Mr. Stewart, Ms. Tierney, Mr. Schubert and subordinate Patricia Camino all supports Ms. Moser's assessment of Ms. Kramer's performance issues, and there is implicit support in the testimony of other witnesses.

46. All of this, the truth of which need not be decided here, was in Ms. Moser's mind before she knew of the MS and she was entitled to credit it even if it were not the truth.

47. While Ms. Kramer was employed at BOA, Mr. Stewart, Ms. Tierney and Ms. Camino had no knowledge that Ms. Kramer has multiple sclerosis or that she had hired an attorney to represent her concerning her employment at BOA and had asked for accommodations under the ADA.

48. Ms. Kramer's counsel had candidly stated that he has no direct proof that anyone of rank at BOA knew of the MS before the June 18, 1999 lawyer letter, but he thinks such an inference can be made on circumstances. He is wrong. Indeed, if one looks at Mr. Sherman's letter, which contains some factual errors, and puts the matter in context, there is a strong flavor that Ms. Kramer is less concerned about accommodating a disability and more concerned with some plausible theory to bring her to safety within the bank. In reference to the letter, the Court was reminded of the phrase, "In a storm, any port will do."

49. With respect to the ultimate truth of Ms. Moser's opinion of Ms. Kramer's failings, it is very difficult to decide how true all these complaints may be, but some are. As Ms. Kramer has said, she certainly had a motive to be on her best behavior to keep her job. But the truth is she also had a clear disagreement with the way she had been treated and a good reason, from her perspective, to protest or even to be uncooperative.

50. Mr. Schubert, for example, did not trust Ms. Kramer — perhaps even feared her, and certainly viewed her as a rival, and his views, in the end, can be confirmed by actions Ms. Kramer took after her termination, which he correctly viewed, even if they were not intended as such, as a threat to some of the bank's client base.

51. As stated earlier, however, there are others, not in Mr. Schubert's position, whose personal position at the bank was not being threatened, who also informed Ms. Moser of their perceptions of Ms. Kramer' shortcomings, and the perceptions are not significantly different than those of Mr. Schubert.

52. At the time the termination decision was made, both Ms. Moser and Ms. Mixon knew that Ms. Kramer had MS. They not only knew she had MS, they knew she had filed a discrimination complaint against BOA with the EEOC.

53. Ms. Kramer and Ms. Moser, the principal players in this case, both testified at trial. They are both highly intelligent, well-educated persons and have substantial experience in working within large financial institutions. Neither of them could be characterized as timid or submissive. Both are highly compensated, and neither is reluctant to claim credit for her achievements, as was demonstrated by Ms. Kramer's testimony on what fees ought to have been allocated to her efforts.

54. Mr. Lies, the former supervisor whose testimony was presented by deposition, knew both Ms. Kramer and Ms. Moser well, although it appears he knew Ms. Kramer

better. He is a witness who seemed to have no ax to grind. Mr. Lies left employment at BOA in April 1999.

55. Mr. Lies said he had given Ms. Kramer annual performance evaluations and gave her fine rankings but thought she could improve her demeanor and teamwork.

56. Mr. Lies said that when Ms. Kramer first joined BOA she went through a period of adjustment. "She was a very strong, dominant personality with a very firm understanding and a somewhat limited patience for ancillary white noise in discussions and working with others and tried to focus very quickly on issues and move on."

57. He noted the culture at BOA was collegial, laid back, and Ms. Kramer's attitude and demeanor were "difficult to take" by some co-workers. "They had issues with being challenged and being pushed and things of that nature, and so it was more of a personality differential," Mr. Lies stated. He said she understood this and tried to, and did, improve in this area.

58. Mr. Lies said Ms. Kramer had very strong skills and technical capabilities, which were acknowledged by competitors and were a reason BOA hired her. She had to work around her "forceful and dominant personality." However, he noted, "over a passage of time I think everybody came to understand that what she was really trying to do was help them (team members) and the discipline she was passing on was something that was very good for their development."

Appendix B

59. Mr. Lies said Ms. Kramer's credit judgment was respected. There was, as Mr. Lies called it, a chemistry issue in her dealings with others. According to Mr. Lies, he observed conflict — what he termed "head butting" — between Ms. Kramer and Mr. Schubert.

60. Mr. Lies said of Ms. Moser that "she was average to above average in credit skills but less good than Ms. Kramer." He thought from a personality communications standpoint Ms. Moser was very good.

61. He also gave some insight into the source of dispute between the two. Of Ms. Moser, he said, "she needed to be a little bit more sensitive to the way people did things. I think there was a desire to clearly do everything the NationsBank way, which I think there is some resistance across the board from people from B of A and I think (Ms. Moser) had a demeanor and personality that some people would view as very positive but when you put that together with somebody like Colleen (Kramer), who had a very dominant personality, there could be issues between those."

62. Mr. Lies also said, "Mary Lynn (Moser) is a very thoughtful person on the surface. I think she wanted to be very communicative, but yet it was a cultural. . . .but it was a culture that existed in Charlotte that in my personal estimation that avoided conflict and confrontation which was very different from (Ms. Kramer's) personality. She would be much more up-front and confrontational. I know I experienced it in the period of time we were merging. I would quickly focus on particular issues and force decisions and things like that which was very alien from the way they had

operated. So just the chemistry differential between her and (Ms. Moser) was difficult, and then when you layer on top of that a geographic differential between Charlotte and Chicago, that can cause issues."

63. The evidence presented at trial indicates that Ms. Kramer is excellent in her credit judgment and less than truly splendid in teamwork. Thus, there was a dispute as to whether her teamwork skills with subordinates and others were poor, medium, or even good enough. Nevertheless, it is not the Court's province to judge whether her teamwork skills are good enough.

64. After seeing and hearing Ms. Kramer and Ms. Moser at some substantial length, it is evident that they could not work well together. The teamwork between the two did not appear to be good. Based on the information presented at trial, it seems that if Ms. Moser were the team leader and Ms. Kramer the boss, it is likely that Ms. Moser would not have lasted very long. Although there probably would not have been a formal termination, Ms. Moser would have left by moving to some other place in the bank.

65. Ms. Kramer and Ms. Moser appear to be like oil and water, and it seems that regardless of the position each might hold, whomever was the subordinate would have not survived.

66. Ms. Kramer testified that she felt she could not do anything right in the eyes of Ms. Moser. Based on the testimony presented at trial, it appears that she is essentially right. However, that is the only reason Ms. Kramer was fired,

and the filing of her complaint was not a factor in that decision.

67. It seems that Ms. Moser wrote the May 28, 1999, memo with an honest eye to preserving Ms. Kramer's value to the bank, which indicates that Ms. Moser did think of saving Ms. Kramer.

68. Indeed, Ms. Kramer may have been savable, even in the context of the syndication group in which she worked. However, it is understandable that a supervisor could reasonably decide that the cost and effort involved in doing so would be far too high.

69. One could argue, although Ms. Kramer's counsel did not, that the potential disability of Ms. Kramer was a motivating factor in her discharge in a way unjustified by existing law.

70. Ms. Mixon, who was Ms. Moser's superior, and who played a role in the decision to terminate, understood quite clearly the application of the ADA to Ms. Kramer.

71. That is why Ms. Mixon told Ms. Moser to make the requested accommodations. Whether Ms. Moser refused to make them or simply uttered words that were misunderstood by Ms. Kramer is not decided by the Court — for purposes of this ruling, it is assumed Ms. Moser did refuse accommodations.

72. Hence, it is possible that Ms. Mixon and Ms. Moser considered the future and realized that Ms. Kramer's

condition might well worsen over time and create demands for further accommodations, perhaps costly and troublesome ones, and perhaps requests made only to fend off criticisms of her performance.

73. This would be a possible motive to fire Ms. Kramer, but it would not help Ms. Kramer's case, for it is not retaliation for filing the complaint. Nor can such a motive be considered a refusal to offer a requested reasonable accommodation in violation of the ADA.

74. Potential future disabilities are not the subject of the ADA, and it is hard to see how they could be in any practical way. This case is an example of why this is so. Ms. Kramer could not possibly have asked for accommodation for disabilities that did not and may never exist. She does not think that her ability to perform is about to end anytime soon. Rather, she thinks that she can do the job even now.

75. BOA could not reliably surmise whether the accommodations would or would not be reasonable. For example, travel might become extremely difficult for Ms. Kramer in the years to come but no one can know whether this would, in fact, affect her ability to do the job even in terms of the technical advances that may result, and in fact, September 11 did result in massive decrease in travel. Also, the only additional accommodation she would ask for today is that she would be not asked to travel on short notice. Thus, even travel is not yet precluded.

76. Considerations of possible future disability and accommodations for Ms. Kramer did not enter the mind of

either Ms. Moser or Ms. Mixon or indeed anybody at BOA. They were willing to make accommodations. The jobs in question are not jobs that involve physical performance or "heavy lifting jobs."

CONCLUSIONS OF LAW

1. BOA is an employer within the definition of the ADA. 42 U.S.C. § 12111(5)(A).

2. This Court has jurisdiction based upon 28 U.S.C. §§ 1331 and 1343(a).

3. Venue is proper in this Court as the Defendant resides in this state and district, and all acts complained of took place in this state and district. 28 U.S.C. § 1391.

4. The burden-shifting analysis for employment discrimination cases as set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973) applies to claims of retaliation. *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997); *see also, Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998) (courts look to Title VII retaliation cases for guidance in assessing ADA retaliation claims). In order to succeed on a claim of retaliation, a plaintiff first must prove that she engaged in protected activity, that she suffered an adverse employment action and that there is a causal link between the protected activity and the adverse action. *Hunt-Golliday*, 104 F.3d at 1014, *see also, Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995). To ultimately prevail, the plaintiff must rebut the employer's

legitimate, non-discriminatory reasons for the adverse action and establish that a discriminatory motive was the determining factor behind the employer's adverse action. *Roth*, 57 F.3d at 1459.

5. In addition, a plaintiff raising a retaliation claim must have a reasonable belief that she is opposing unlawful discrimination. *Id.* at 1460.

6. In this case, it is apparent that Ms. Kramer's complaint of disability discrimination under the ADA was futile. It was not, in any realistic sense, a factor that lead to her.

7. The stated reasons for her firing are not a pretext for unlawful retaliation under the ADA. They represent the truth and reflect the thoughts of those individuals who made the decision to discharge her.

8. In the end, even if Ms. Moser erred in her judgment about the effect of Ms. Kramer on other employees or her occasional perceived lapses of teamwork, Ms. Moser held an honest belief in her judgment and she did have a reasonable basis for her belief, which is what the courts are referring to when they talk about a decision having some basis in fact. *See, e.g., Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) (question is not whether the employer's reasons for a decision are *right,* but whether the employer's description of its reasons is *honest)* (emphasis in original); *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (pretext does not address correctness or desirability of reasons offered for employment decisions; rather, it addresses whether employer honestly believes in

the reasons it offers). They are not speaking about absolute truth-they are speaking about a reasonable basis for one's belief.

9. Even if the stated reasons were pretext, they could have been pretext to conceal the reluctance of those in a position to fire Ms. Kramer to work with someone of her personality. That ground for decision is not prohibited by federal law. *See Reeves v. Sanderson Plumbiniz Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 2108-9 (2000).

10. Upon hearing the evidence at trial, no reasonable trier of fact would have concluded that retaliation for complaining about disability discrimination; hiring a lawyer to assert her rights under the ADA; or filing a charge of disability discrimination with the EEOC played any role in BOA's decision to terminate Ms. Kramer's employment.

11. Although damage issues were not addressed, there was adequate evidence of efforts at mitigation, and the testimony of BOA's expert that Ms. Kramer should have found employment in a relatively short period of time is not accepted.

12. For the reasons stated above, judgment is entered for the Defendant, Banc of America Securities, LLC.

ENTER:

s/ James B. Zagel
James B. Zagel
United States District Judge

DATE: 11 Sep 2002

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judgment In A Civil Case

Case Number: 99 C 6768

COLLEEN P. KRAMER

v.

BANC OF AMERICA SECURITIES

* * *

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendant, Banc of America Securities, LLC and against plaintiff, Colleen P. Kramer. Plaintiff takes nothing from the defendant.

Michael W. Dobbins, Clerk of Court

s/ Donald R. Walker
Donald Walker, Deputy Clerk

Date: 9/11/2002

APPENDIX C — EXCERPT FROM DOCKET SHEET FOR 1:99-CV-6768 U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS FILED MAY 10, 2002

* * *

05/10/2002	* * *	SCHEDULE set on 5/10/02 by Hon. James B. Zagel : Jury trial stricken. Bench trial set to 10:30 5/15/02. No notice [Date Entered: 05/14/02, By: dw]

APPENDIX D — STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I--EMPLOYMENT

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

* * * *

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

* * * *

Appendix D

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--
EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-5. Enforcement provisions

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

* * *

Appendix D

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

* * * *

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I--GENERALLY

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited

under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of

1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)].

Appendix D

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1)

of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

* * * *

(2)

Supreme Court, U.S.
FILED
MAR 2 0 2004
OFFICE OF THE CLERK

No. 03-1451

IN THE

Supreme Court of the United States

COLLEEN P. KRAMER,

Petitioner,

v.

BANC OF AMERICA SECURITIES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit correctly held, in an issue of first impression among the federal circuit courts of appeals, that a plaintiff who brings a claim of retaliation against an employer under the Americans with Disabilities Act cannot recover compensatory and punitive damages and therefore has no right to a jury trial.

RULE 29.6 STATEMENT

Respondent Banc of America Securities, LLC, is a subsidiary of NationsBanc Montgomery Holdings Corporation; NB Holdings Corp.; and Bank of America Corporation.

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STATEMENT OF THE CASE

Petitioner Colleen P. Kramer sued her former employer, Banc of America Securities, LLC ("BOA") for, among other things, retaliatory discharge in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. (the "ADA"). A judge of the United States District Court for the Northern District of Illinois dismissed the disability discrimination count of her complaint on summary judgment but allowed her to proceed to trial on her ADA retaliation claim.

Once the disability discrimination count was dismissed, BOA moved to exclude compensatory and punitive damages and to strike Petitioner's jury demand. The district court granted the motion and held a bench trial. At the trial's conclusion the district court found in favor of BOA. Petitioner appealed, claiming that the district court erred when it determined that she was not entitled to compensatory and punitive damages on her retaliation claim and therefore had no right to a jury trial.

The Seventh Circuit affirmed. It held that the plain language of the statute in question, 42 U.S.C. § 1981a(a)(2), which provides for damages for disability discrimination, makes clear that the statute "does not contemplate compensatory and punitive damages for a retaliation claim under the ADA." (App. 8a) Because compensatory and punitive damages were unavailable, and the only remedies she was entitled to seek were equitable ones, the appellate court held that Petitioner had no statutory or constitutional right to a jury trial. (App. 10a) Petitioner now seeks a writ of certiorari. BOA respectfully opposes the petition, for the reasons set out below.

REASONS FOR DENYING THE PETITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari because the decision of the Seventh Circuit Court of Appeals was correct and there is no conflict among the appellate courts on the issue presented.

I. The Seventh Circuit Correctly Held That The Statute Is Clear And Unambiguous.

The Seventh Circuit's statutory analysis is sound and should not be disturbed. When enacted in 1990, the ADA allowed plaintiffs in cases where the alleged disability discrimination arose in an employment setting to pursue the same remedies available under the Civil Rights Act of 1964 (Title VII). Before the enactment of the 1991 Civil Rights Act, Title VII and thus the ADA provided only for equitable remedies and did not allow for compensatory and punitive damages. *See* 42 U.S.C. § 12203 (the retaliation provision of the ADA), 42 U.S.C. § 12117 (the enforcement provision for ADA claims arising in employment) and 42 U.S.C. § 2000e-5(g) (the remedies section of Title VII). The 1991 Civil Rights Act expanded the remedies for some – but not all types of ADA claims. The applicable statute for disability discrimination remedies – 42 U.S.C. § 1981a(a)(2) only lists two types of ADA claims that are subject to the expanded remedies of compensatory and punitive damages – §§ 12112 and 12112(b)(5). As the Seventh Circuit explained, the statute provides, in pertinent part, that:

> "[i]n an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination . . . under . . . section 102 of the [ADA] or committed a violation of

> section 102(b)(5) of the [ADA], against an individual, the complaining party may recover compensatory and punitive damages. . . .

42 U.S.C. § 1981a(a)(2) (App. 6a)

Conspicuously absent is any expansion of the remedies for a retaliation claim against an employer under the ADA. Therefore, because claims of retaliation under the ADA are not listed, compensatory and punitive damages are not available for such claims. Instead, as the Seventh Circuit held, the remedies available for ADA retaliation claims against an employer are limited to the remedies set forth in 42 U.S.C. § 2000e-5(g)(1). (App. 8a)

It appears that Petitioner now, for the first time, is shifting the focus of her argument from § 1981a(a)(2), the disability provision of the statute, to include a contention that she also was entitled to compensatory and punitive damages under § 1981a(a)(1), the civil rights provision of the statute. (*See* Br. pp. 3, 25) This new contention was not raised in the lower court and is not properly developed in the petition, and therefore should not be given consideration. Moreover, § 1981a(a)(1) is inapplicable because, by its plain terms, it applies to actions brought by a complaining party under Title VII, not under the ADA. The applicable provision is the subsection entitled "Disability" – that is, § 1981a(a)(2).

This Court's canons of statutory construction dictate that where, as here, a statute is clear, there is no need to invoke any other aids to interpretation. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. [. . .] When the words of a statute

are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (citations omitted).

II. Petitioner Attempts To Manufacture A Circuit Split Where None Exists.

A. The Only Appellate Court To Directly Address The Issue Since *Kramer* Has Followed The Seventh Circuit's Lead.

A newly issued ruling from the Fourth Circuit, which follows the Seventh Circuit's lead, deflates Petitioner's argument of a circuit split. The district court case *Rhoads v. FDIC,* No. CCB-94-1548, 2002 WL 31755427 (D. Md. Nov. 7, 2002), which Petitioner cites in support of her argument, is not good law. The Fourth Circuit, in its review of the *Rhoads* plaintiff's post-trial appeal, cited the Seventh Circuit's opinion in *Kramer* and held that the plaintiff's claim of compensatory and punitive damages for her employer's alleged violation of the ADA's anti-retaliation provision failed "because such relief is unavailable." *Rhoads v. FDIC, ("Rhoads II"),* No. 03-2373, 2004 WL 817649 (4th Cir. Apr. 16, 2004), (per curiam), citing *Kramer* and affirming on other grounds the district court's decision in *Rhoads v. FDIC*, 286 F. Supp. 2d 532, 537 (D. Md. 2003), that plaintiff could not recover compensatory damages.

While the Fourth Circuit's decision in *Rhoads II* is unpublished and therefore is not binding precedent in the Fourth Circuit pursuant to its Local Rule 36(c), the ruling is the first indication that appellate circuits will follow, not reject, the Seventh Circuit's precise and detailed statutory interpretation in *Kramer.*

B. Petitioner's Concessions Undermine Her Contention That The Circuits Are Split.

Despite Petitioner's overarching argument that the Seventh Circuit's decision conflicts with the "settled legal understandings" of other circuits, the petition is filled with concessions that a true split of the circuits does not exist. Petitioner repeatedly admits – as she must – that no other circuit court of appeal has expressly ruled on the legal question at issue in the *Kramer* case. For example:

- Petitioner states:

> Although other circuit courts of appeals *have not yet specifically analyzed* the "tangle of interrelated statutes" as the Seventh Circuit did, . . . this Court should not wait for further decisions on the question presented because the law in the circuit and district courts is now in conflict and can only become more sharply divided over time.

(Br. p. 6) (emphasis added)

- Petitioner notes that the Seventh Circuit considered and rejected any persuasive value in cited cases from other circuit courts of appeals. While the Seventh Circuit acknowledged that some circuit courts of appeals have affirmed jury verdicts where compensatory damages were awarded on ADA retaliation claims, Petitioner concedes that "the court below stated that *none of these circuit decisions* '*examined the legal question* of whether [compensatory and punitive] damages [under 42 U.S.C. § 1981a(a)(2)] were authorized for an ADA retaliation claim'[.]" (Br. p. 8) (emphasis added)

• Petitioner further concedes that "*the precise issue* of whether a plaintiff is entitled to recover compensatory and punitive damages for a retaliation claim under the ADA *was not specifically analyzed*" in some of the very cases Petitioner attempts to argue are in conflict with the Seventh Circuit's ruling below. (Br. p. 10) (emphasis added)

C. The Appellate Court Cases That Petitioner Cites Are Devoid Of Any Analysis To Support An Inference Of Conflict With The Seventh Circuit.

Indeed, there is a key difference between the Seventh Circuit's opinion in *Kramer* and the other appellate cases that Petitioner cites – the Seventh Circuit squarely addressed the *legal* question of whether compensatory and punitive damages are allowed, while the other appellate courts addressed the *factual* question of whether sufficient evidence supported the claimed damages. Thus, the other appellate courts are not in direct conflict with the Seventh Circuit. None examined the legal question of whether such damages are authorized, but rather the courts appear to have assumed, without deciding, that remedies could include compensatory and punitive damages.

1. Eighth Circuit

Petitioner incorrectly contends that "it is clear" that the Eighth Circuit has confirmed that compensatory and punitive damages are recoverable for an ADA retaliation claim, citing *Salitros v. Chrysler Corp.*, 306 F.3d 562 (8th Cir. 2002) and *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001). (Br. p. 10) Petitioner also cites *Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) as authority for approval of jury verdicts awarding compensatory and

punitive damages for retaliation under the ADA. (Br. p. 9) In fact, none of those cases is a clear authority on the question presented here. Even though the *Salitros* and *Foster* decisions affirm awards of compensatory and punitive damages, the rulings do not address whether there is statutory authority for such remedies. In the *Stafne* case, the appellate court affirmed a jury verdict in favor of the *employer* and never reached the legal issue of remedies for an ADA retaliation claim. Thus, it remains an open question how the Eighth Circuit would rule if presented with the precise issue of the unavailability of legal remedies for an ADA retaliation claim in the employment setting.

Petitioner also errs in her description of district court decisions within the Eighth Circuit. She claims that the *Salitros, Foster* and *Stafne* appellate decisions were issued after contrary decisions within the same circuit by Kansas district courts. (Br. p. 9) The Kansas courts, however, are within the Tenth Circuit, not the Eighth Circuit.

2. Second Circuit

Again, the authority that Petitioner cites, *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), simply does not address the question at hand. The Seventh Circuit properly rejected the *Muller* case because it does not provide any statutory analysis of remedies under the ADA.

3. Tenth Circuit

The Tenth Circuit in *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999) did not provide any clear direction on the issue. The case provides no reasoning on the issue of damages for an ADA retaliation claim. The case involved

both a disability discrimination count and a retaliation count under the ADA and there is no indication in the opinion of any apportionment of damages between those two claims. As further proof that the *EEOC v. Wal-Mart Stores, Inc.* decision provides no clear guidance on the legal issue of the available remedies for an ADA retaliation claim, district courts in the Tenth Circuit make no mention of it. Three subsequent district court cases within the Tenth Circuit have held that a plaintiff has no right to compensatory and punitive damages for an ADA retaliation claim against an employer and therefore has no right to a jury trial. In *Johnson v. Ed Bozarth Chevrolet, Inc.*, 297 F. Supp. 2d 1286 (D. Colo. 2004), the court noted: "The Tenth Circuit *has not addressed* whether § 12203 provides for compensatory and punitive damages." (emphasis added)); *see also Sink v. Wal-Mart Stores*, 147 F. Supp. 2d 1085, 1101 (D. Kan. 2001); *Boe v. AlliedSignal, Inc.*, 131 F. Supp. 2d 1197, 1202-03 (D. Kan. 2001).

III. District Courts Overwhelmingly Agree That Compensatory And Punitive Damages And Trial By Jury As Of Right Are Unavailable To ADA Retaliation Plaintiffs.

In a bold, sweeping statement, Petitioner claims "the *only* federal decisions which are consistent with the Seventh Circuit's decision are from the Missouri and Kansas district courts issued *before* the Eighth Circuit's *Salitros, Foster* and *Stafne* decisions in 2002. (Br. p. 12) Petitioner is incorrect. She has overlooked a recent district court case from Colorado, mistakenly places the Kansas district courts into the Eighth Circuit, and cites cases that are not on point.

A. The Most Recent And Well-Reasoned Cases Undercut Petitioner's Analysis Of The Statutes At Issue.

Contrary to Petitioner's argument, there is no evidence that courts are in conflict and "can only become more sharply divided over time." (Br. p. 6) Courts are more and more united on the issue, not divided. A number of courts used the same analysis and reached the same conclusions as the district and appellate courts in *Kramer*.[1]

1. *Rhoads v. FDIC*, No. CCB-94-1548, 2002 WL 31755427 (D. Md. 2002) is not good law on the issue of compensatory and punitive damages for an ADA retaliation claim because, as explained above, the Fourth Circuit recently cited *Kramer* with approval and determined that such damages are unavailable. Moreover, the Seventh Circuit rejected any persuasive value in the district court's 2002 opinion in *Rhoads* because it ignored the plain text of § 1981a(a)(2) and instead inappropriately relied upon legislative history. (App. 9a)

2. *Johnson v. Ed Bozarth Chevrolet, Inc.*, 297 F. Supp. 2d 1286 (D. Colo. 2004) was decided January 14, 2004, just days before the Seventh Circuit released its opinion in *Kramer*. Without benefit of the *Kramer* appellate or district courts' analysis, the district court reached the same conclusion as those courts for the same reasons and, like the courts in *Kramer*, it rejected *Ostrach v. Regents of Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997).

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1. Other district courts did not have the benefit of Judge Zagel's May 2002 analysis in *Kramer* because his oral ruling was transcribed as part of the record in the case but was not memorialized in a written opinion or minute order that would have made it readily accessible through online research to counsel and courts in other jurisdictions.

3. In *Brown v. City of Lee's Summit, Mo.*, No. 98-0438-CV-W-2, 1999 WL 827768 (W.D. Mo. June 1,1999) the court engaged in a thorough and detailed statutory analysis and concluded that because the applicable damages section of the Civil Rights Act of 1991 does not mention the ADA's retaliation provision, 42 U.S.C. § 12203, but does specify other ADA provisions, compensatory and punitive damages are not available for a retaliation claim. Absent legal remedies, a jury trial was not available, the court held.

4. *Boe v. AlliedSignal, Inc.* 131 F. Supp. 2d 1197, 1202-03 (D. Kan. 2001) follows the reasoning in *Brown* and traces the various statutory provisions to conclude that compensatory and punitive damages – and therefore a jury trial – are not available for an ADA retaliation claim in employment.

5. *Sink v. Wal-Mart Stores, Inc.* 147 F. Supp. 2d 1085 (D. Kan. 2001) likewise concluded that the statutory language and legislative history of the ADA "simply do not support a valid basis for a claim of compensatory and punitive damages for an ADA retaliation claim." *Id.* at 1101. Because entitlement to a jury trial for an ADA claim is contingent on the availability of compensatory and punitive damages, the court in *Sink* ruled that it would hold a bench trial of the retaliation claim. *Id.* at 1088.

B. Petitioner's District Court Authorities Are Unsound.

Petitioner strains credulity with citations to cases that either are poorly reasoned or are not on point.

1. *Ostrach v. Regents of Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997) was the earliest published district court opinion to find that a plaintiff with an employment-based ADA retaliation claim could recover compensatory and punitive damages and therefore had a right to a jury trial. Courts have roundly criticized the *Ostrach* decision in numerous subsequent rulings, and rightly so. The court in *Ostrach* overlooked the crucial portion of § 1981a(a)(2) that lists the specific statutory sections for which a party may recover compensatory and punitive damages and instead determined that an employee had a general right to damages. As the Seventh Circuit noted, the court in *Ostrach* strained to reach its conclusion by excising key provisions from the statute through the use of ellipses. (App. 9a-10a) *See also Brown*, 1999 WL 827768 (the *Ostrach* court "erroneously disregarded critical statutory language" and therefore is "unreliable authority.").

2. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Me. 1994) does not address the question of whether compensatory and punitive damages, and therefore a jury trial, are available to an employee who claims retaliation under the ADA. In *Braverman*, the court dismissed the ADA retaliation claim under 42 U.S.C. § 12203 (Count IV) on summary judgment. *Id.* at 602, 604. The court's discussion of the appropriateness of a jury trial for an ADA claim was limited to the disability discrimination claim brought under subsection I of the ADA, not the retaliation claim under subsection IV of the ADA. There is no dispute here that ADA disability discrimination claimants have legal remedies and thus have a jury trial right. Petitioner's reliance on *Braverman* is misplaced – the case simply is not on point because it does not reach the retaliation question at issue here.

3. *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) is inapplicable here because it was not an employment case; it was a public accommodations case. The remedies for an ADA retaliation claim in the public accommodations context are found by tracing the statute from 42 U.S.C. § 12203 to § 12133 (under subsection II of the ADA), which in turn refers to remedies under Title VI of the Civil Rights Act. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (remedies for violation of Section II of the ADA are coextensive with remedies available in a private cause of action brought under Title VI). As the *Niece* case illustrates, Congress drafted the ADA to provide various routes to remedies for retaliation claims depending upon the setting in which the claim arises. Because *Niece* was not an employment case, it, too, is not on point.

4. *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003) also suffers from infirm analysis. The Seventh Circuit, in its *Kramer* opinion, criticized the *Lovejoy-Wilson* case for its reliance on *Muller v. Costello*, 187 F.3d 298, which did not address the underlying question of whether compensatory and punitive damages are available. (App. 8a-9a) Also, the district court in *Lovejoy-Wilson* on remand placed undue emphasis on its appellate court's use of phrases such as "a jury could conclude" and "a jury could reasonably find" to support its position that a jury trial was warranted. The appellate court in *Lovejoy-Wilson* had not expressly addressed the legal question of remedies and right to jury trial for an ADA retaliation claim.

In summary, at least seven courts (two at the appellate level and five district courts, including the lower court in *Kramer*) have reached the same conclusion – compensatory

and punitive damages are not available for an ADA retaliation claim in the employment setting and therefore plaintiffs have no right to a jury trial for such claims. Given the uniformity of well-reasoned caselaw on the issue, there is no need for guidance from this Court.

IV. Petitioner's Public Policy Argument For An Expansive View Of ADA Retaliation Remedies Holds No Sway Because Congress Unambiguously Limited The Available Remedies.

Petitioner's public policy argument for an expansive view of ADA retaliation remedies is no match for the black letter law of statutory construction: Where Congress specifically has limited the remedies, courts cannot allow for general remedies. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.")

Not only does the text of § 1981a(a)(2) specifically limit remedies for disability plaintiffs, other portions of 42 U.S.C. § 1981a also provide proof that Congress intentionally limited the remedies. For example, the statute includes caps on damages based on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) The statute also excludes compensatory and punitive damages in cases where an employer acted in good faith to provide a reasonable accommodation. *See* 42 U.S.C.§ 1981a(a)(3) Petitioner's citations to cases that state that a "general right to sue means courts can use any available remedy" are inapplicable here, where the statute is narrow and specific as to the available remedies.

Moreover, in other provisions in the Civil Rights Act of 1991, Congress treated retaliation in a different manner from other forms of discrimination. For example, several appeals courts have held that the Civil Rights Act of 1991 does not permit remedies for mixed-motive retaliation claims under Title VII. *See McNutt v. Board of Trustees of Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 932-36 (3d Cir. 1997); and *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996).

Just as Petitioner relies on sources outside the statute itself, so, too, did the plaintiff in *McNutt*, who argued that legislative history, the EEOC's written guidance, an employment law treatise and "common sense" supported his argument that he was entitled to remedies in a mixed-motive retaliation case. The Seventh Circuit in *McNutt* rejected the persuasive value of such authorities because the plain language of the statute showed that injunctive and monetary relief and attorneys fees were unavailable for mixed-motive retaliation claims. In so holding, the appellate court noted: "Legislation is often the product of compromises that are not readily apparent to the public or even consistent in their relation to other contemporaneous enactments from the same body. It is not the role of courts to question these kinds of seemingly inexplicable legislative choices where they are spelled out in plain statutory language." *McNutt*, 141 F.3d at 709 (citation omitted).

Petitioner's citation to the enforcement guidance from the Equal Employment Opportunity Commission, issued in 1998, is not useful here. The EEOC flatly states, without analysis or citation to any authority, that compensatory and punitive damages are available for retaliation claims under the ADA. Even if the EEOC had provided statutory analysis

to support its statement, such analysis is not entitled to any weight here. As this Court stated in an opinion earlier this term, "deference to [EEOC's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Syst., Inc. v. Cline*, __ U.S. __, 124 S. Ct. 1236, 1239 (2004) (citation omitted). There, as here, regular interpretive methods leave no serious question as to legislative intent. Thus, there is no need to resort to the EEOC's guidelines on the subject of retaliation.

Finally, the law review article that Petitioner cites[2] is of no import. The author's analysis relies heavily on *Ostrach* and engages in the same unsound reasoning that has drawn widespread criticism from other courts, not the least of which is the Seventh Circuit in its *Kramer* opinion. The clear and unambiguous text of the statute and the clear weight of authority disfavor the view raised in the article.

V. Petitioner Has Waived Any Separate Argument That She Has A Seventh Amendment Right To A Jury Trial For An ADA Retaliation Claim.

The Seventh Circuit rejected Petitioner's feeble attempt to argue that she had a constitutional right to a jury trial even if she was not entitled to recover compensatory and punitive damages. (See App. 5a, n.1) ("the absence of any supporting authority or development of an argument constitutes a waiver on appeal.")

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2. Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation,* 14 Stan. L. & Pol'y Rev. 241, 262 (2003).

Yet, Petitioner repeatedly invokes the Seventh Amendment in her petition as a separate and distinct reason for the Court to consider her case:

• She implores the Court to take her case because, she claims, the Seventh Circuit made "a serious error" that can "critically deprive victimized employees of their Seventh Amendment right to a trial by jury." (Br. p. 6)

• She claims "[a]n employee's fundamental right to a trial by jury under the ADA is at stake." (Br. p. 7-8)

• She contends that in addition to the statutory construction issue of ADA remedies, "at least equally significant is the ADA plaintiff's Seventh Amendment right to a trial by jury, an obvious cornerstone of our judicial system." (Br. p. 19)

• She seeks this Court's involvement because of the "profound impact of depriving ADA plaintiffs of their Seventh Amendment right to a jury trial." (Br. p. 25).

To the extent that Petitioner argues that there is a constitutional right to a jury trial for an ADA retaliation claim even if there is no statutory entitlement to compensatory and punitive damages, she waived the argument by her failure to develop it in the lower court.

Moreover, Petitioner's prediction of dire constitutional consequences arising from the Seventh Circuit's ruling is unvarnished hyperbole. It is undisputed that if Congress had allowed for the legal remedies of compensatory and punitive damages for an ADA retaliation claim in employment – which it did not – then claimants would be entitled to a jury trial.

However, since the only available remedies are equitable ones, the Seventh Amendment right to a jury trial is not implicated here.

CONCLUSION

For the reasons stated, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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